Case Number: 3332929/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Christopher Stead	**v**	Network Rail Infrastructure Limited

Heard at: Cambridge **On**: 16 January 2019

Before: Employment Judge Tynan

Appearances
For the Claimant: In person
For the Respondent: Mr B Uduje, Counsel

JUDGMENT

1. The Employment Tribunal has no jurisdiction to consider the claimant's claim or part of it and accordingly the claim is dismissed.

REASONS

1. On 11 April 2016 the claimant commenced employment with Network Rail as an Operational Planner. His employment terminated in January 2018

2. The claimant was suspended on 9 November 2017 after the respondent was made aware of an article published by Kent Online which reported that the claimant had been found guilty of downloading images and films of children being sexually abused. The article had further reported that the claimant was employed by the respondent; that he had admitted the offences with which he had been charged; that he had been sentenced to a term of 12 months' imprisonment, suspended for two years; that he would have to attend a sex offender's programme and complete 150 hours of unpaid work; and that his name would appear on the sex offender's register.

3. The respondent terminated the claimant's employment without notice or payment in lieu of notice for gross misconduct. The stated reason for dismissal in a letter to the claimant from Mr Richard Moody of the

respondent, dated 12 January 2018, was that the claimant had brought the respondent into disrepute through a link to a criminal conviction. Mr Moody is a Lead Strategic Planner, though was a Capability and Capacity Analysis Manager at the relevant time.

4. By a Claim Form presented to the Employment Tribunals on 12 September 2018, following a period of Early Conciliation from 3 to 20 August 2018, the claimant brought complaints of unfair dismissal and that he was owed notice pay. His complaint of unfair dismissal was rejected as he had less than two years' service at the date he was dismissed. Accordingly, it was just the remaining claim for notice pay that came before me.

5. The claimant represented himself at tribunal. He had filed and served a six page statement, which he signed and dated at tribunal. On behalf of the respondent, I heard evidence from Mr Moody and also from Mr Robert Freeman, Head of Production Development for the respondent. Mr Freeman had heard the claimant's appeal against his dismissal.

6. There was a 179 page hearing bundle. Mr Uduje also filed a skeleton argument on behalf of the respondent and provided the tribunal and the claimant with a copy of the case report of the Court of Appeal's decision in Dietmann v Brent London Borough Council [1988].

Findings

7. The terms on which the claimant was employed by the respondent are contained in a document entitled 'Statement and Terms of Employment – Band Five' at pages 28 to 40 of the hearing bundle (the 'Statement'). The Statement confirms the date of commencement of continuous service as 11 April 2016. Section 1 of the Statement includes the following,

   "Network Rail requires the highest standards from you in your performance at work and your general conduct and in particular you must:

   - *…conduct your personal and professional life in a way that does not adversely affect the Company's standing and reputation."*

8. Section 18 of the Statement deals with leaving the company and confirms the respondent's right to terminate employment without notice or payment in lieu of notice should an employee be found guilty of gross misconduct following a disciplinary hearing. The statement sets out a non-exhaustive list of examples of gross misconduct and includes,

   "You make any statement or take any action, which may damage the reputation of Network Rail or act in any way, which in Network Rail's opinion brings or will bring it into disrepute."

9. It was common ground between the parties that there was no explicit requirement in the Statement or in any of the respondent's employment policies that employees must positively disclose criminal offending or other

conduct that would or might affect the respondent's standing or reputation. It is, of course, an implied term of all employment relationships that the parties will not conduct themselves in a manner calculated or likely to destroy or seriously damage the essential relationship of trust and confidence between them.

10. Section 18.1 of the Statement comprises three potential elements,

    a. making any statement which may damage the reputation of Network Rail;

    b. taking any action, which may damage the reputation of Network Rail; and

    c. acting in any way, which in Network Rail's opinion, brings or will bring it into disrepute.

11. As drafted, section 18.1 does not require that a statement or action actually damages the respondent's reputation, instead it is sufficient that damage may be caused. Further, there is no requirement that the statement(s) made, action taken or acts/acting must be deliberate, wilful or culpable, and there is no explicit requirement that they should be done with a view to causing damage to the respondent's reputation or bringing it into disrepute. And in the case of acts/acting, it is sufficient that in the respondent's opinion the acts/acting bring it into disrepute. The section wording does not reflect the claimant's view that it must be shown that there was "malice aforethought" on his part.

12. As the claimant had insufficient length of service to bring a claim that he had been unfairly dismissed, it is unnecessary for me to make any specific findings as to the process by which the respondent came to the conclusion that he should be dismissed without notice for gross misconduct.

13. The respondent first spoke to the claimant about the matters that had been brought to its attention on 9 November 2017, and subsequently invited him to attend a formal investigation interview on 23 November 2017. In a letter to the claimant dated 21 November 2017 inviting him to that meeting, the respondent additionally identified that it was investigating an allegation that he had failed to disclose a criminal conviction. Following an investigation, which is evidenced at pages 64 to 91 of the hearing bundle, the claimant was invited to a formal disciplinary hearing on 5 January 2018. At that point there were three allegations against the claimant, namely bringing the respondent into disrepute through a link to a criminal conviction, failure to disclose a criminal conviction and dishonesty by calling in sick when he was not in fact ill in order to attend his sentencing hearing in November 2017. In the event, the second two allegations were not upheld.

14. At the formal disciplinary hearing on 10 January 2018, the claimant was accompanied by Shona Clydesdale from the transport union, the TSSA. The hearing meeting minutes are at pages 97 to100 of the hearing bundle.

The claimant stated that there were certain inaccuracies with the Kent Online article, including the alleged number of images taken from his computer (the reported number was 422,000, including 14,000 videos) and an incorrect reference to him having previously worked for the respondent in 2012. The respondent stated in the hearing, and reiterated at tribunal, that he was not aware his role at the respondent would be disclosed as part of the Court case. As part of his representations at the disciplinary hearing, the claimant said he did not intend to bring the respondent into disrepute. The claimant and Ms Clydesdale invited the respondent to consider the limited local distribution of the article.

15. As noted already, the claimant was summarily dismissed and his dismissal was confirmed by Mr Moody in a letter dated 12 January 2018 (pages 101 and 102 of the hearing bundle). The stated reason for dismissal was that the claimant had brought the respondent into disrepute through a link to a criminal conviction. The rationale was summarised as follows:

- *"There is a link to the crime committed and Network Rail within the public domain;*
- *Members of the public have seen the article through Kent Online news website;*
- *The article is of a negative view as there is a link to a criminal conviction;*
- *There is a probability that a member of the public whom has viewed the article will have a degraded view of Network Rail."*

16. Questioned by Mr Uduje, the claimant accepted that findings in relation to those four matters had been made at the disciplinary hearing. He accepted that there was a link to the crime(s) committed by him and to the respondent within the public domain. Further, he accepted that members of the public had seen the article through the Kent Online news website. However, he did not accept unequivocally that the article was negative but instead he said, he would argue that it was down to one's point of view whether the article was positive, negative or neutral. He went on to assert that there was, in his view, a positive view to be taken of the article.

17. I have significant difficulty in accepting his evidence in that regard, indeed, even understanding his evidence. The very firm impression I formed from hearing the claimant give evidence is that he is unable or unwilling to acknowledge the very serious nature of his offending and that he has little insight or appreciation of the concerns this might give rise to. Viewed objectively, the article was negative and in my judgment, would have been viewed in that way by any fair-minded reader. Whether or not the article was accurate, it refers to the claimant as someone whom had downloaded more than 400,000 images and films of children being sexually abused, including a video of a young girl crying during her ordeal and a baby, *"possibly struggling"* whilst being sexually assaulted, a fact the article additionally reported. Ms George, the barrister who represented the claimant at Maidstone Crown Court in 2017, told that court that when unemployed the claimant sank into self-loathing, that he had health issues,

that he knew he had a problem and needed professional assistance. I have no hesitation in rejecting the claimant's assertion that there is a positive view to be taken of the article, which reflects distorted thinking on his part. In my judgment, as well as being a negative article, in linking the claimant to the respondent it was potentially damaging to the respondent's reputation and potentially brought it into disrepute. The published public comments at page 60 of the hearing bundle evidence a hostile public reaction. One of the posts notes that the claimant had been employed at Network Rail (even if the reported details were inaccurate). Questioned by Mr Aduje, the claimant conceded that the article had the potential to damage Network Rail's reputation. However, he then sought to downplay the significance commenting that most, if not all, articles in the media about Network Rail are negative.

18. It was the claimant's case both during the disciplinary proceedings and at tribunal, that he had not known his barrister would disclose, as part of his sentencing plea, that he was employed by Network Rail. He said that she had disclosed the identity of his employer without his authority. As such, he contends that he did not 'make a statement', 'take any action' or 'act in any way' for the purposes of section 18.1 of the Statement. However, he did accept under questioning by Mr Aduje that he had not given his barrister any specific instruction not to disclose the identity of his employer. I found the claimant's evidence in this respect evasive and unsatisfactory. Pressed by Mr Uduje, the claimant stated that he had not objected to the information being put into the public domain by his barrister because he "did not want to make her look an idiot and she was trying to get [him] the best deal possible". His evidence was that he would not have interrupted her unless she had got something wrong and the fact was that he did work for the respondent. However, the report on Kent Online does not indicate any objections by the claimant when his barrister, incorrectly stated that the claimant had given up a job as a Project Manager with Network Rail in 2012 because it was too stressful. I find that it suited the claimant very well for his barrister to put whatever information she saw fit before the court if this might keep him out of prison. Indeed, that was the outcome she achieved for him at the hearing. I reject his attempts now to suggest that she was acting without or beyond her authority or that he did not fully understand what was happening at the hearing. I reject his evidence, if it is such, that he was a passive bystander in that process. It may have been a pressured situation and the claimant may have had limited time with his barrister prior to the sentencing plea, but I find that she acted at all times on his instructions and with his authority.

19. The claimant's evidence was that he received Mr Moody's letter of 12 January 2018 on or around 15 January 2018.

20. On Thursday 18 January 2018 the claimant was arrested at home and remanded into custody on 19 January 2018. On 23 February 2018 he pleaded guilty to one indictment and the case was adjourned for sentencing. According to the claimant's claim form there were a series of additional indictments to which he pleaded not guilty, at which point the prosecution

offered no evidence. He was sentenced in respect of the matter in respect of which he had pleaded guilty on 29 June 2018. It seems he was released from custody on that date.

21. The fact that the claimant was arrested on 18 January 2018 and remanded into custody for over six months begs the question how the claimant might have performed his contract with the respondent after 18 January if he had not been summarily dismissed. I invited the claimant's submissions on this point, specifically why the employment relationship would not have been frustrated on 18 January 2018. He sought to suggest that his arrest and remand into custody was as a result of his dismissal from the respondent's employment. His Claim Form does not make that link, nor does his witness statement. There is no evidence before me on which I can possibly conclude that the claimant's dismissal by the respondent, let alone its summary dismissal of him, was the cause of his arrest on 18 January 2018, or subsequent remand into custody. As such it is very difficult for me to understand on what basis any alleged breach of contract by the respondent has caused the claimant any losses from 18 January 2018.

22. I do accept the claimant's evidence that during the period he was remanded in custody in 2018, it was not practicable for him to commence early conciliation through Acas or to present a claim to the Employment Tribunal Service. He was initially held incommunicado and even when these restrictions were lifted I accept he did not have access to the necessary information or resources required to submit an Employment Tribunal claim. Ms Clydesdale of the TSSA continued to represent his interests by filing an appeal on his behalf against his dismissal and by attending the appeal hearing on 26 February 2018 on his behalf.

23. In the course of his evidence at tribunal, the claimant told me that he had studied Employment Law as part of his University degree course. The relevant modules had included contract law, unfair dismissal and discrimination. When I asked the claimant about the Employment Tribunal time limits and limitation periods, he told me that he had needed to refresh his knowledge on these matters and he described this as part of his *"homework"* prior to the December 2017 disciplinary hearing, specifically in the event of a potentially adverse outcome. I find that he was aware in or around November 2017 that, in the event he was dismissed by the respondent, he would need to file a complaint with the Employment Tribunals within three months of the date of termination of his employment (subject to any extension of time for early conciliation).

24. I further note that on 17 March 2018 the claimant wrote to Mr Freeman because he had by then received a copy of the appeal hearing outcome. His letter (pages 123 – 126 of the hearing bundle), details various matters which are now included within his witness statement in these proceedings. The claimant refers in his letter to his dismissal being unfair and also that he should not have been dismissed without notice. He clearly had in mind by 17 March 2018 that he had potential claims against the respondent for unfair and wrongful dismissal, as well as the basis for such claims.

25. I further note that in his letter of 17 March 2018 to Mr Freeman the claimant wrote,

"I wholeheartedly agree that on some level Network Rail have been brought into disrepute through a link to my criminal conviction. I have never disputed this, nor have I said otherwise."

26. At page 3 of the addendum to Form ET1, the claimant sets out the circumstances leading to him presenting his claim out of time. He relies solely upon his incarceration during the period 18 January 2018 to 29 June 2018. In his evidence at tribunal he additionally referred to the fact that there were significant restrictions imposed upon him in terms of his use of computers even once he had been released from custody. He said that as part of the suspended sentence handed down in November 2017 he was restricted to six hours' computer use each week at a public library. He said he needed to deal with a range of other issues on those occasions he had access to a computer.

Law and conclusions

27. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination of the contract giving rise to the claim. Even assuming the effective date of termination was 15 January 2017, rather than 12 January 2017 as the respondent contends, any claim to the Employment Tribunals should, ordinarily, have been presented on or before 15 April 2017.

28. Article 7(c) of the 1994 Order enables an employment tribunal to consider a complaint which has not been brought before the end of the period of three months beginning with the effective date of termination if the complaint is brought within such further period as the tribunal considers reasonable, in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three month period. There are two limbs to that test.

29. In 2011 the Employment Appeal Tribunal, in the case of John Lewis Partnership v Charman, reviewed various authorities in relation to the application of section 111(2)(b) of the Employment Rights Act 1996, an identical statutory provision regarding time limits in unfair dismissal claims. Charman concerned an employee who was ignorant of the law and who delayed bringing a claim whilst his appeal against dismissal was decided. The EAT referred to historic cases such as Singh v Post Office [1973] and Bodha v Hampshire Area Health Authority [1982]. In the Singh case it was found to be practicable to commence proceedings while an internal appeal was pending and in Bodha, the mere fact of an internal appeal did not mean that it was not reasonably practicable to bring a claim. The claimant in this

case does not suggest that the appeal was a factor in his delay. In any event the appeal was determined on 8 March 2018, just over six months before the Claim Form was filed with the Employment Tribunals. As in Bodha, the claimant had the benefit of support from his trade union. Ms Clydesdale would, or should, have been aware of the time limit for bringing any claim. In any event whether or not she was so aware, the claimant had done his "homework" and refreshed his University learning. There was certainly no suggestion by the claimant that he had been misled in any way. This is not a case such Marks and Spencer PLC v Williams Ryan, in which the employer had given the claimant advice which misled her into believing that she could defer employment tribunal proceedings before her internal appeal was disposed of. The claimant was not misled by the respondent. On the contrary he took steps to remind himself of the applicable time limits in November 2017.

30. According to the Employment Appeal Tribunal in Charman, the starting point is that if an employee is reasonably ignorant of the relevant time limit, it cannot be said to be reasonably practicable for him to comply with them. That was not the case here. Even in 'ignorance' cases, the tribunal will be required to consider whether the claimant ought to have made enquiries about how to bring an employment tribunal claim. In every case that is a question of fact.

31. As a result of his University degree course and the further research he undertook in November 2017, the claimant was aware at all times that he might have legal recourse in the event he was summarily dismissed. He was arrested and remanded into custody just a few days after he was dismissed. Throughout his time on remand the claimant had no access to a computer. I accept that it was not practicable for him to present a claim to the Employment Tribunal prior to 29 June 2018. I further accept the claimant's evidence that for two or possibly three weeks following his release from custody on 29 June 2018 he had no access to a computer whilst he sought clarification from the police as to the restrictions that had been placed upon him. However, I am satisfied that he could have filed a claim prior to 3 August 2018 when he contacted Acas to commence early conciliation. Putting aside whether or not notification to Acas on 3 August was effective to extend time, in my judgment it was not reasonable for the claimant to delay presenting his claim until 12 September 2018. He might reasonably have filed a claim by the end of July 2018. Instead, disregarding the time he spent on remand, it took the claimant 11 weeks to file his Claim Form. Article 7 (and the equivalent statutory provisions) do not confer a right to a 3 month extension in cases where it is not practicable to present a claim in time. The legal position is that any claim must be presented within such further period of time as is reasonable. In my judgment that was no later than 31 July 2018.

32. As such there is no basis for me to extend time pursuant to Article 7 of the 1994 Order. In those circumstances the tribunal has no jurisdiction to consider the complaint of breach of contract and the claim shall therefore be dismissed. It will be apparent in any event from my findings above that

the claim to notice pay would not have succeeded even had it been brought in time.

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Employment Judge Tynan

Date: ……13.02.19……

Sent to the parties on: ...13.02.19.....

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For the Tribunal Office